115-482

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~325~~. 59

P. R. BOHLEN, PLAINTIFF IN ERROR,

vs.

RICHARD ARTHURS, ASSIGNEE OF A. F. BAUM AND JOHN CARRIER, BANKRUPTS; A. M. McCLURE, JAMES CARTHERS AND CHARLES WILSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 7, 1882.

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1 Among the rolls, records, and judicial proceeding had in the circuit court of the United States, in and for the western district of Pennsylvania, entered at No. 62, May term, 1877, wherein P. R. Bohlen is plaintiff and Richard Arthurs, assignee of Carrier & Baum, bankrupts, and others, are defendants, in an action of replevin, may be found the following words and figures, to wit:

Appearance Docket Entries.

P. R. BOHLIN, a citizen of the State of Tennessee, *v.* RICHARD ARTHURS, assignee of A. F. Baum and John Carrier, bankrupts; A. M. McClure, James Carthers, and Charles Wilson, citizens of the State of Pennsylvania.	No. 62. May Term, 1877.

R. Arthurs, Geo. Shiras, Jr.

Miller & McBride, for A. M. McClure; H. C. Campbell, for R. Arthurs, assignee.

1877, April 24. Upon precipe filed, summons in replevin issued for twenty-seven rafts of square white pine timber, containing about ninety-four thousand cubic feet, and of the value of about sixteen thousand dollars, having on the ends of the logs the mark "J. M. C," made with a marking iron, and now in the Allegheny river and in Red Bank creek and Sandy Lick creek. Returnable to first Monday of June next. 1877, May 2. Narr.
2 filed. 1877, April 24. Property replevined. April 25. Upon giving bond for the release of said property, the same was released. Mar. $10. 1877, June 19. Rule to plead issued. 1877, July 3. Plea of defendants filed. 1878, May 13. Replication of plaintiff filed. 1878, May 13. Case called for trial and jury sworn. 1878, May 14. After hearing evidence jury returned a verdict for defendants and against plaintiff; H. D. Gamble, clerk. Same day motion and reasons for a new trial filed. 1879, June 4. Motion for a new trial argued and new trial refused. 1879, June 6. Order of June 4, refusing new trial, reconsidered and motion for new trial argued by Robert Arthurs, C. A. V. 1879, June 25. Motion for a new trial denied, and new trial refused. 1880, December 17. Bill of exceptions by the plaintiff herein signed and sealed by Wm. McKennan, cir. judge, filed. 1881, April 28. Judgment is hereby entered upon the verdict herein, as of November 8, 1879, pursuant to rule 61 of this court; H. D. Gamble, clerk. 1882, April 17. Bond on writ of error to U. S. Supreme Court presented in open court and approved, and same filed. Same day writ of error returnable in the U. S. Supreme Court on the second Monday of October next; allowed and filed. Same day citation directed to above-named defendants, returnable on a like day, with the writ of error herein allowed.

3 *Precipe for Summons in Replevin.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

P. R. BOHLEN, a citizen of the State of Tennessee,

vs.

RICHARD ARTHURS, assignee in bankruptcy of A. F. Baum and John Carrier; A. M. McClure, James Carthers, Charles Wilson, citizens of the State of Pennsylvania.

Issue writ of replevin for twenty-seven rafts of square white pine timber, containing about ninety-four thousand cubic feet, and of the value of about sixteen thousand dollars, having on the ends of the logs the marks "J. M. C," made with a marking iron, and now in the Allegheny river, and in Red Bank creek and Sandy Lick creek, in said district; the right and title to the possession of which, the plaintiff says, is in him, and not in said defendants.

ROBERT ARTHURS,
Att'y for Pl'ff.

H. D. GAMBLE, *Clerk.*

(Indorsed:) No. 62. May term, 1877. P. R. Bohlen *vs.* Richard Arthurs, assignee of Carrier & Baum, bankrupts, *et al.* Precipe for replevin. Filed April 24, 1877.

4 *Summons in Replevin.*

UNITED STATES OF AMERICA, }
Western District of Pennsylvania, } *ss:*

The President of the United States to the marshal of the western district of Pennsylvania, Greeting:

If P. R. Bohlen, a citizen of the State of Tennessee, makes you secure in prosecuting his claim with effect against Richard Arthurs, assignee in bankruptcy of A. F. Baum and John Carrier; A. M. McClure, James Carthers, and Charles Wilson, citizens of the State of Pennsylvania, late of your district, then you are commanded that, justly and without delay, you cause to be replevied and delivered to the said P. R. Bohlen twenty-seven rafts of square white pine timber, containing about ninety-four thousand cubic feet, and of the value of about sixteen thousand dollars, having on the ends of the logs the mark "J. M. C.," made with a marking iron, and now in the Allegheny river and in Red Bank creek and Sandly Lick creek, in said district, which the said Richard Arthurs, assignee in bankruptcy of A. F. Baum and John Carrier, A. M. McClure and James Carthers and Charles Wilson took and unjustly detains, as it is said, &c., &c.; and that you have by sureties and safe pledges the said Richard Arthurs, assignee in bankruptcy of A. F. Baum and John Carrier, A. M. McClure, James Carthers, and Charles Wilson, so that they be and appear before the judges of the circuit court at a session
5 of said court there to be held for the said district, the first Monday of June next, to answer the said P. R. Bohlen of a

plea wherefore they took the goods and chattels aforesaid, the property of the said P. R. Bohlen, and the same detain against sureties and safe pledges, &c., -c., so that the said judges of the said court may hear from thence no complaints for want of justice; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Pittsburgh, this 24th day of April, A. D. 1877, and in the Independence of the United States the one hundred and first.

[SEAL.] H. D. GAMBLE, *Clerk.*

(Indorsed:) No. 62. May term, 1877. P. R. Bohlen *vs.* Richard Arthurs, assignee of Carrier and Baum, bankrupts, *et al.* Replevin.

APRIL 24, 1877.

In obedience to the within writ I have replevined the property within described, and, April 25, 1877, the defendants gave bond for the release of said property, [and] the same was released.

JOHN HALL,
U. S. Marshal.

6 *Narr.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1877.

P. R. BOHLEN
vs.
A. M. MCCLURE, RICHARD ARTHURS, JOHN CATHERS, and CHARLES MILLER. } No. 62.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

A. M. McClure, Richard Arthurs, John Cathers, and Chas. Wilson, yeoman, late of said district, were summoned to answer P. R. Bohlen, a citizen of the State of Tennessee, of a plea wherefore they took the goods and chattels, &c., of him, the said P. R. Bohlen, and unjustly detained them against sureties and pledges, until, &c. And whereupon the said P. R. Bohlen, by Robert Arthurs, his attorney, complains that the said A. M. McClure, Richard Arthurs, John Cathers, and Charles Wilson, on the — day of April, A. D. 1877, at the district aforesaid, took the goods and chattels, viz., twenty-seven rafts of square white pine timber, containing about ninety-four thousand cubic feet, then in the Allegheny river and in Red Bank creek and Sandy Lick Creek, in said district, unjustly detained against sureties, pledges, &c. Wherefore he, the said P. R. Bohlen, saith he is injured and hath damage to the value of twenty-five thousand dollars, and therefore he brings suit, &c.

ROB'T ARTHURS,
Att'y for Pl'ff.

(Indorsed:) No. 62. May term, 1877. P. R. Bohlen *vs.* A. M. McClure *et al.* Narr. Filed May 2, 1877. Arthurs.

7 *Rule to Plead.*

In the Circuit Court of the United States for the Western District o Pennsylvania. May Term, 1877.

P. R. BOHLEN,
vs.
RICH'D ARTHURS, Ass., *et al.* } No. 62.

Enter rule to plead on ten days' notice or judgment.

ROB'T ARTHURS,
Att'y for Pl'ff.

H. D. GAMBLE, Esq., *Clerk.*

June 19, 1877.

Indorsed: No. 62. May Term, 1877. Bohlen *vs.* Arthurs *et al.* Rule to plead. Filed June 19, 1877. Arthurs.

8 *Plea.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1877.

P. R. BOHLEN
vs.
R. ARTHURS, Assignee in Bankruptcy of Carrier & Baum *et al.* } No. 62.

Richard Arthurs, assignee in bankruptcy of the firm of Carrier & Baum, by H. C. Campbell, his attorney, A. M. McClure, by Miller & McBride, his attorneys, the defendants in above-entitled suit, say that, as they are informed, all the parties allege to have an interest in the property claimed in this suit are not joined, and that the court does not have jurisdiction of the subject-matter in controversy.

That if the said court has jurisdiction of the subject-matter and parties then defendants say that the goods and chattels mentioned and specified in plaintiff's declaration, viz., twenty-seven rafts of white pine square timber, are not the goods and chattels of the said plaintiff; that the plaintiff does not have any title to or property in the said twenty-seven rafts of timber, as alleged in his declaration, but that the title to and property in said twenty-seven rafts of timber, the goods and chattels specified, belongs to Richard Arthurs, assignee in bankruptcy of Carrier & Baum, and A. M. McClure, the defendants.

H. C. CAMPBELL,
Att'y for Arthurs.
MILLER & McBRIDE,
For A. M. McClure.

July 3, 1877.

(Indorsed:) No. 62. May term, 1877. P. R. Bohlen *vs.* R. Arthurs, assignee, &c., *et al.* Defendants' pleas. Filed July 3, 1877. H. C. Campbell; Miller & McBride.

9 *Replication.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1877.

P. R. BOHLEN
vs.
R. ARTHURS *et al.* } No. 62.

The plaintiff, in reply to the plea of defendants, states that the matters therein set forth are not true, and of this he puts himself upon the country.

ROB'T ARTHURS,
Att'y for Pl'ff.

(Indorsed:) No. 62. May term, 1877. Bohlen *vs.* Arthurs *et al.* Replication. Filed May 13, 1878. Arthurs.

10 *Minutes of Trial.*

In the Circuit Court of the United States for the Western District of Pensylvania. May Term, 1877.

P. R. BOHLEN
vs.
RICHARD ARTHURS *et al.* } No. 62.

MAY 13, 1878.

The above case being at issue a jury was called, who came, viz: James P. O'Neil, John H. Scott, John O. Adams, Joseph O'Brien, John H. Wells, W. H. Butler, Robert Campbell, Josiah B. Dodds, Patterson Porter, H. N. Kirkpatrick, Levi Dawson, John Lewis, twelve good and lawful men, who having been duly summond, returned, balloted for, and empanneled, were sworn to well and truly try, and a true verdict render according to the evidence; and the evidence and arguments of counsel for the respective parties being closed, by direction of the court the jury returns a verdict in favor of defendants and against the plaintiff on May 14, 1878.

11 *Motion for a New Trial.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1877.

BOHLEN
vs.
RICHARD ARTHURS and others. } No. 62.

And now, to wit, May 14th, 1878, comes the plaintiff by George Shiras, Jr. and Robert Arthurs, and moves the court to order a new trial of the above case.

Reasons.

1st. The learned judge erred in directing the jury to find a verdict for the defendant.

2d. The learned judge erred in not permitting the plaintiff to have his cause passed on by the jury.

3d. The learned judge erred in holding that under the evidence the plaintiff was not entiled to recover.

(Indorsed:) No. 62. May term, 1877. P. R. Bohlen *vs.* R. Arthurs and others. Filed May 13, 1878.

And now, to wit, May 14, 1778, the plaintiff has leave to file his within motion.

SHIRAS & ARTHURS.

12 *Orders Overruling Motion for a New Trial*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1877.

P. R. BOHLEN
vs.
RICHARD ARTHURS. } No. 62,

(From the minutes of said court.)

Order of June 11, 1879.

Motion for a new trial of the above cause argued, and motion denied and new trial refused.

Order of June 6, 1879.

On motion of Robert Arthurs, Esq., order of June 11 entered in the above case, overruling motion for a new trial, reconsidered, and, the court being willing, Mr. Arthurs argued in favor of said motion for a new trial. C. A. V.

Order of June 25, 1879.

Motion for new trial in the above cause, heretofore argued, now denied, and new trial refused.

12½ No. 62. Term, May. Year, 1877. Def't, Bohlen, P. R. Pl'ff, R. Arthurs, assignee *et al.* Date of judg't, Ap'l 28, 1881. Am't, 39.50. Int. from ——. Costs, ——.

13 *Bill of Exceptions.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1877.

P. R. BOHLEN, a citizen of the State of Tennessee,
vs.
A. M. MOREHOUSE, RICHARD ARTHURS, JOHN CATHERS, and CHARLES WILSON, citizens of the State of Penna. } No. 62.

Be it remembered that on the 24th day of April, A. D. 1877, an action of replevin was brought in the circuit court of the United States for the western district of Pennsylvania, by P. R. Bohlen, a

citizen of the State of Tennessee, against A. M. McClure, Richard Arthurs, John Cathers, and Charles Wilson, to recover the possession of twenty-seven rafts of white pine timber, containing about ninety-six thousand cubic feet, and of the value [of] about sixteen thousand dollars; that upon the service of the writ of replevin the defendants appeared to said action and did, on the 25th day of April, A. D. 1877, give and furnish to John Hall, Esq., the U. S. marshal for said district, a bond, satisfactory and sufficient to him, and thereupon he delivered to the defendants and allowed them to retain the said twenty-seven rafts of white pine timber of the dimensions and value aforesaid; and the plaintiff having filed a declaration in due form the said defendants did, on the — day of
14 ——, A. D. 1877, by their counsel, file their plea that the right of property in said twenty-seven rafts of timber was in them, the said defendants, and not in the said plaintiff, as alleged in his said declaration. On the 14th day of May, A. D. 1878, the parties to said cause being at issue a jury was called, empanelled, and sworn. Whereupon the party plaintiff proceeded to offer his evidence to maintain the issue on his part, it having been agreed in open court by the counsel of the respective parties that both plaintiff and defendants claimed under A. F. Baum, John Carrier, and Rob't Osborne, whose title to the said land from which said timber was taken was admitted to be good and sufficient previous to the 18th day of December, A. D. 1872; and said plaintiff offered in evidence article of agreement between Robert Osborne, A. F. Baum, John Carrier, and Nathan Carrier, of the one part, and Wm. Phillips, of the other part, dated the 18th day of December, A. D. 1872, and recorded in the county of Clearfield, in miscellaneous book C, pp. 14, 15, &c., and in the county of Jefferson on the 30th day of June, 1873, in book No. 27, pp. 412, &c.; then proved the death of Wm. Phillips and appointment of administrators, and that R. B. Phillips and Phœbe O. Phillips were his only heirs-at-law; and plaintiff then offered in evidence a deed of assignment made by R. B. Phillips and J. Patton Lyon, administrators of the estate of said Wm. Phillips, to P. R. Bohlen (plaintiff) and George I. Whitney, dated June 17, 1874, and recorded in said county of Clearfield August 15, 1874, in deed-book No. 5, p. 306, and in said county of Jefferson on Feb'y 19, 1875, in deed-book No. 30, p. 12.

15 Also deed from R. B. Phillips and Pheobe O. Phillips, heirs-at-law of Wm. Phillips, to Phillip R. Bohlen and Geo. 1. Whitney, dated June 23, 1874, and recorded in said county of Clearfield, August 15, 1874, and in said county of Jefferson Feb'y 17, 1875; and it was admitted that all said conveyances and contract embrace the land from which said timber was cut and taken. Plaintiff also offered in evidence contract between said P. R. Bohlen and Geo. I. Whitney, of the one part, and Joseph McCracken, dated September 13, 1876, in and by which the said McCracken did agree, for a stipulated price, to cut from said land about one hundred thousand cubic feet of square pine timber, and deliver the same to said P. R. Bohlen and Geo. I. Whitney at Pittsburgh, Penna. Also an assign-

ment, dated April 23, 1877, of all the interest of Geo. I. Whitney in said timber to P. R. Bohlen.

And Joseph McCracken, being then sworn, testified that the twenty-seven rafts, the subject of this action, were cut by him, in pursuance of the said contract, from said land; they contained ninety-three thousand cubic feet, and worth at Pittsburgh sixteen cents per cubic foot, and at the place from which they were taken about eleven to twelve cents. George Wilson also testified that such sales of
16 such timber were made in the spring of 1877 at fifteen and one-half cents per cubic foot, part of which was of the timber in dispute. Plaintiff's counsel then offered the writ and marshal's return, date of both, April 24, 1877, and closed. Defendants' attorney then moved the court for a nonsuit.

Whereupon the court instructed the jury that the plaintiff had failed to show sufficient property in the timber to sustain replevin, and directed a verdict to be entered in favor of the defendants; to which judgment of the court the plaintiff did then and there except, and request the court to seal a bill of exceptions, which is accordingly done.

W. McKENNAN,
Cir. Judge.

(Indorsed:) No. 62. May term, 1882. P. R. Bohlen *vs.* A. M. McClure *et al.* Bill of exceptions. Filed Dec. 17, 1880.

17 *Bond.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

P. R. BOHLEN, a citizen of the State of Tennessee,
vs.
RICHARD ARTHURS, Assignee in Bankruptcy of A. F. Baum and John Carrier; A. M. McCLURE, JAMES CATHERS, and CHARLES WILSON.
No. 62. May Term, 1877.

Know all men by these presents, that we, P. R. Bohlen, by his attorney-in-fact, Robert Arthurs, and L. H. Williams and Ralph Bagaley, all of Pittsburgh, Allegheny county, State of Pennsylvania, are held and firmly bound unto Richard Arthurs, assignee in bankruptcy of A. F. Baum and John Carrier, his successor or successors, and A. M. McClure, James Carthers and Charles Wilson, their heirs, executors, and administrators, in the full and just sum of one thousand dollars; to which payment, well and truly to be made, we bind ourselves, and each of us, our heirs, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 23d day of Jan'y, A. D. 1882.

Whereas the above-named P. R. Bohlen hath prosecuted a
18 writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Pennsylvania:

Now, therefore, the condition of this obligation is such that if the above-named P. R. Bohlen shall prosecute his said writ of error to effect, and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

P. R. BOHLEN, [SEAL.]
By his att'y-in-fact, ROB'T ARTHURS. [SEAL.]
RALPH BAGALEY. [SEAL.]
L. HALSEY WILLIAMS. [SEAL.]

Signed, sealed, and delivered in presence of—
GEO. I. WHITNEY.

Indorsed: No. 62. May term, 1877. P. R. Bohlen *vs.* Richard Arthurs, aasignee, *et al.* April 17, 1882. Approved. M. W. Acheson, D. J., sitting as U. S. cir. judge. Filed April 17, 1882.

19 In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1877.

P. R. BOHLEN
vs.
RICHARD ARTHURS, Assignee of Carrier & Baum, Bankrupts, *et al.* } No. 62.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 17th day of April, A. D. 1882.

[SEAL.] H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Marcus W. Acheson, sitting as judge of the United States circuit court for said district, do hereby certify that H. D. Gamble above named was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

Pittsburgh, April 17, 1882.

M. W. ACHESON,
D. J., Sitting as U. S. Circuit Judge.

20 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the United States circuit court for the western district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition

of the judgment of a plea which is in the said circuit court before you, between P. R. Bohlen, a citizen of Tennessee, plaintiff, and Richard Arthurs, assignee of A. F. Baum and John Carrier, bankrupts; A. M. McClure, James Carthers, and Charles Wilson, citizens of Pennsylvania, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what if right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17 day of April, A. D. 1882.

[SEAL.] H. D. GAMBLE,
Clerk U. S. Cir. Court.

Allowed by—
M. W. ACHESON,
D. J., Sitting in Circuit Court.

21 UNITED STATES OF AMERICA, *Western District of Pennsylvania,* } *sct:*

To Richard Arthurs, assignee of A. F. Baum and John Carrier, bankrupts; A. M. McClure, James Carthers, and Charles Wilson, citizens of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court, wherein P. R. Bohlen, a citizen of the State of Tennessee, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, this 17th day of April, A. D. 1882.

M. W. ACHESON,
D. J., Sitting as Judge of U. S. Circuit Court.

APRIL 25, 1882.

Service of this citation accepted for A. M. McClure.
MILLER & McBRIDE,
Att'ys for A. M. McClure.

22 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States for the western district of Pennsylvania, Greeting:

Whereas in a certain suit in said circuit court between P. R. Bohlen, plaintiff, and Richard Arthurs, assignee of A. F. Baum and John Carrier, bankrupts; A. M. McClure, James Carthers, and Charles Wilson, defendants, which suit was removed to the Supreme Court of the United States, by virtue of a writ of error, agree-
23 bly to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"In the bill of exceptions are the following, viz: 'And said plaintiff offered in evidence article of agreement between Rob't Osborne, A. F. Baum, John Carrier, and Nathan Carrier, of the one part, and William Phillips, of the other part, dated the 18th day of December, A. D. 1872, and recorded in the county of Clearfield, in miscellaneous book "C," pp. 14, 15, &c., and in the county of Jefferson on the 30th day of June, 1873, in book No. 27, pp. 412, &c.,' omitting entirely a copy of said article of agreement. Also the follow-
24 ing: 'And plaintiff then offered in evidence a deed of assignment made by R. B. Phillips and J. Patton Lyon, administrators of the estate of Wm. Phillips, to P. R. Bohler (plaintiff) and George I. Whitney, dated June 7, 1864, and recorded in said county of Clearfield August 15, 1872, in deed-book No. 5, page 306, and in said county of Jefferson on Feb'y 19, 1875, in deed-book No. 30, page 125. Also deed from R. B. Phillips and Phœbe A. Phillips, heirs-at-law of William Phillips, to Phillip R. Bohler and George I. Whitney, dated June 23, 1874, and recorded in said county of Clearfield August 15, 1874, and in said county of Jefferson Feb'y
25 17, 1875,' and omitting entirely copies of said deeds."

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the fourth day of May, A. D. 1883.

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

[Endorsed:] Received May 7, 1883. H. D. Gamble, cl'k.

26 Whereas Robert Osburn, of Brookville, in the county of Jefferson and Commonwealth of Pennsylvania; A. F. Baum, of Pittsburgh, in the Commonwealth of Pennsylvania, and John Carrier, of Cincinnati, in the State of Ohio, are joint owners of certain tracts of land, hereinafter described, situate partly in the county of Jefferson and partly in the county of Clearfield, in the Commonwealth of Pennsylvania aforesaid, containing in the aggregate 3,300 acres;

And whereas Nathan Carrier, Jr., of Brookville, in the Commonwealth of Pennsylvania aforesaid, is sole owner of certain lands situate in the counties and Commonwealth aforesaid, adjacent to the said lands belonging to said Osburn, Baum, and John Carrier;

And whereas the said parties have mutually agreed to sell and convey the undivided one-half of all the aforesaid lands to them respectively belonging and hereinafter described to Wm. Phillips, of Pittsburgh, for himself and his associates, for the consideration and upon the terms hereinafter mentio..ed and specified:

Now, therefore, this agreement, made and entered into this 18th day of December, A. D. 1872, by and between the said Robert Osburn, A. F. Baum, John Carrier, and Nathan Carrier, Jr., parties of the first part, and the said Wm. Phillips, party of the second part, witnesseth:

That Robert Osburn, A. F. Baum, and John Carrier, three of the above-named parties of the first part, for the consideration and
27 covenants hereinafter mentioned and expressed, have granted and sold unto the party of second part, and by these presents do, jointly and severally, for themselves, their heirs, executors, and administrators, covenant, promise, grant, and agree to and with Wm. Phillips, the said party of the second part, that upon payment of the consideration and performance of the covenants hereinafter specified and mentioned by the said party of the second part, they, the said Robert Osburn, A. F. Baum, and John Carrier, shall and will, by good and lawful deed or deeds, with covenant of general warranty, well and sufficiently grant, convey, and assure unto the said party of the second part, his heirs, and assigns, in fee-simple, clear of all encumbrances, the undivided one-half of all the following-described real estate, viz: The undivided one-half of all those three certain tracts or pieces of land situate in the townships of Huston and Brady, in the county of Clearfield, and Commonwealth aforesaid, bounded and described as follows: The first thereof beginning at an old hemlock corner on line of warrant 4398, thence along tract line S. 89° E. 425 perches to a maple; thence along tract line of warrant 3593 S. ½° W. 420 perches to post; thence along line of warrant 1988 N. 89¼° W. 432.3 perches to a beech on line of warrant 4399; thence along line of said warrant N. ¾° E. 314 perches to a blocked hemlock; thence N. 3° 25′ E. 108 perches to hemlock, the place of beginning, containing 1,132 acres, and known as warrant 3592.

The second thereof beginning at a beech corner of tract 3592,
28 above described, thence S. 89¼° E. 432.3 perches to a post corner of tracts 3592, 3593, 3584, & 1988; thence along line of tract 3584 S. ¾° W. 172 perches to a post corner; thence along line of tract 2009 N. 89° W. 434.5 perches to a post; thence N. 1½° E. 171.1 perches to beech, the place of beginning, containing 464.68 acres, and known as warrant 1988.

The third thereof, beginning at a post corner of tract 1988 above described; thence along the same S. 89° E. 434.5 perches to a post on line of tract 3584; thence along tract 3584 and balance of tract 2009 S. ¾° W. 398 perches to a post on line of tract 27; thence N. 41° 55′ W. 42 perches to a hemlock; thence N. 88° W. 205 perches to an elm; thence N. 32° W. 57 perches to pine corner of tract 13;

thence along same N. 38° 50′ W. 227 perches to a hickory; thence N. 1° 5″ W. 87 perches to a maple; thence N. 45¾° W. 31.6 perches to a beech; thence 1° E. 33 perches to post, the place of beginning, containing 816.56 acres, and being a part of warrant 2009, and being the same tracts or pieces of land granted and conveyed to Robert Osburn, A. F. Baum, and John Carrier by John Dubois by deed dated March 30th, 1868, and recorded in the county of Clearfield in deed book, vol. F F, pages 60, 61, &c.

Also the undivided one-half of all that certain tract or piece of land adjacent to the tracts last above described, situate in Brady township, in the county aforesaid, bounded on the east by tract No. 13, warranted in the name of Christian Lowers; on the south
29 by other land of said Osburn, Baum, and Carrier; on the west by the Clearfield and Jefferson county line, and on the north by lands of Bell, containing 200 acres, more or less, being the same land warranted in the name of George Mason, and by him granted and conveyed to Robert Osburn, one of the within grantors, by deed dated November 10th, 1870, and recorded in the county aforesaid in deed book, vol. "G G," page 260.

Also the undivided one-half of all that certain tract or piece of land adjacent to lands above described, and bounded as follows, viz: Beginning at maple (O. C.), on line of tract 2009 hereinbefore described, thence by same south 85 perches to hickory (O. C.); thence by same S. 40° E. 216 perches to pine (O. C.); thence by land of John Dubois S. 20° W. 102 perches to pine (O. C.); thence by land of Bell N. 45° W. 320 perches to birch; thence S. 65° W. 32 perches to pine (O. C.); thence by land of Bell S. 40° W. 140 perches to pine (O. C.); thence by same south 72 perches to hemlock (O. C.); thence S. 85° W. 103 perches to ash; thence north by lands of Fye, widow Osburn, and other land of Osburn, Baum, & Carrier, hereinafter next described, 266 perches to pine (O. C.); thence by land of Garrison east 32 perches to maple (O. C.); thence N. 65° 15′ E. 282 perches to sugar (O. C.); thence S. 45½° E. 93.6 perches to maple, the place of beginning, containing 521 acres and allowance, being the same tract granted and conveyed to A. F. Baum and John Carrier within named by heirs of —— Bartroff by deed dated ——, and re-
30 corded in Clearfield county, in deed book, vol. —, page —.

Also the undivided one-half of all that other certain tract or piece of land situate in the township of Washington, in the county of Jefferson, bounded as follows: Beginning at a sugar, the 28th mile tree, thence S. 2° W. 162.4 perches to a post; thence N. 88° W. 163 perches to a post; thence N. 2° E. 162.4 perches to a beech; thence S. 88° E. 163 perches to the place of beginning, containing 165½ acres, being the same piece of land conveyed to Robert Osburn, within named, by Andrew Smith, executor of John Osburn, dec'd, by deed dated June 22nd, 1867, and recorded in the county of Jefferson, in deed book vol. 24, pages 40 & 41, reserving and excepting four acres heretofore granted to the Allegheny Valley Railroad Co. by the within named Osburn, Baum & Carrier, to be located on line of said railroad known as Bennett's Branch at such point as may be selected by said company.

In consideration whereof, the said party of the second part, for himself, his heirs, executors, administrators, and assigns, doth by these presents covenant, promise, and agree to and with the above named Robert Osburn, A. F. Baum, and John Carrier, three of the said parties of the first part, their heirs and assigns, that he, the said party of the second part, shall and will truly pay, or cause to be paid, unto the said Robert Osburn, A. F. Baum, and John Carrier, their executors, administrators, or assigns, the sum of one hundred and twenty-five dollars per acre for each and every acre con-
31 tained in the undivided one-half part of each of the said several tracts or pieces of land hereinbefore described, amounting in the aggregate to the sum of $206,000.00, payment thereof to be made out of the proceeds of said lands, when and as soon as moneys shall be realized from the sale of any part of said lands, or from the sale of timber thereon, or coal or other minerals therein contained, or lumber manufactured upon said premises in mills thereon to be erected as hereinafter mentioned and provided for: Provided, however, and it is hereby distinctly stipulated, covenanted, and agreed, That interest shall not be paid by the party of the second part on the deferred consideration money hereinbefore mentioned, or any part thereof. And it is also stipulated and agreed that the said party of the second part shall have the right at any time, at his option and election, to pay to the parties of the first part, or their legal representatives, the consideration money above mentioned for the whole or any part of the lands and premises hereby granted, and thereupon to demand and receive a deed or deeds for the same as hereinbefore provided for.

And Nathan Carrier, Jr., above named, one of the said parties of the first part, for the consideration and covenants hereinafter mentioned and expressed, hath granted and sold unto the party of the second part, and by these presents doth for himself, his heirs, executors, and administrators, covenant, promise, and agree with Wm. Phillips, the said party of the second part, that, upon payment of the consideration and performance of the covenants hereinafter mentioned and specified by the said party of the second part,
32 he, the said Nathan Carrier, Jr., will, by good and lawful deed or deeds, with clause of general warranty, well and sufficiently grant, convey, and assure unto the said party of the second part, his heirs and assigns, in fee simple, clear of all encumbrances, the undivided one-half of all the following real estate, viz: The undivided one-half part of each of those three several tracts or pieces of land mentioned in the articles of agreement between Wm. N. Gordon and Wm. Smith, dated the 16th day of August, A. D. 1858, and therein described, situate in the township of Washington, in the county of Jefferson, and in the township of Huston, in the county of Clearfield, and Commonwealth aforesaid, adjacent to the lands hereinbefore described and granted to the said party of the second part by Robert Osburn, A. F. Baum, and John Carrier, one of said tracts containing 1,383 acres, one containing 227 acres, and one containing 75 acres, making in all 1,685 acres, more or less, excepting and reserving therefrom 25 acres out of the northwest corner of the tract for 227

acres belonging to Richard Armstrong, also reserving and excepting 61 acres heretofore sold to Grogan, also 50 or 60 acres sold to Nosker, and 25 acres sold to R. Miller; it is hereby stipulated and agreed that the pine timber on said several reservations, passing and belonging to the within and above-named Nathan Carrier, shall be included in the grant hereby made by the said Nathan Carrier to the said party of the second part; that is, that he, the said party of the second part, shall be entitled, under this agreement, to
33 the one-half of all the pine timber passing and belonging to said Nathan Carrier under the several reservations above mentioned. The said lands above mentioned being the same three tracts mentioned *inter alia*, and sold by Wm. M. Smith and A. W. Miner to Ira C. Fuller and the above-named Nathan Carrier by articles of agreement dated January 10th, 1866, and recorded in the county of Clearfield, in miscellaneous book A, pages 269, &c., as reference thereunto being had will fully and at length appear.

In consideration whereof the said party of the second part, for himself, his executors, administrators, and assigns, doth by these presents covenant, promise, and agree to and with the above-named Nathan Carrier, one of the said parties of the first part, his heirs, and assigns, that he, the said party of the second part, shall and will truly pay or cause to be paid unto the said Nathan Carrier, his heirs or assigns, the sum of $125.00 per acre for each and every acre contained in the undivided one-half part of each of the said several tracts or pieces of land hereinbefore mentioned and described, amounting in the aggregate to the sum of $94,625.00. Payment thereof to be made out of the proceeds of said lands when and as soon as moneys shall be realized from the sale of any part of said lands, or from the sale of timber thereon, or coal or other minerals therein contained, or lumber manufactured upon said premises in mills thereon, to be erected as hereinafter mentioned and provided for.

And it is hereby distinctly stipulated, covenanted, and agreed that interest shall not be paid by the party of the second
34 part on the deferred consideration money hereinbefore mentioned, or any part thereof. It is also stipulated and agreed that the said party of the second part shall have the right at any time at his option and election to pay to the said Nathan Carrier, or his legal representatives, the consideration money above mentioned for the whole or any part of the lands and premises hereby granted, and thereupon to demand and receive a deed or deeds for the same, as hereinbefore mentioned and provided for.

And the said party of the second part hereby further covenants and agrees to and with the said Robert Osburn, A. F. Baum, John Carrier, and Nathan Carrier, Jr., to advance and pay the one-half of such amounts of money, as may be necessary to construct and erect a first-class saw-mill or saw-mills, and such fixtures and machinery appurtenant thereto, and such other and additional improvements as he, the said party of the second part, may, from time to time, consider and determine to be advantageous and necessary for the profitable and full developement of the said real estate hereinbefore

described. And the said saw-mills, machinery, and other improvements shall be located on such parts of said lands as may be mutually agreed upon by the said parties of the first and second part herein named, holding as tenants in common, and not as partners.

And it is hereby expressly covenanted and agreed that the said Wm. Phillips, party of the second part, named in this agree-
35 ment, shall have the right and power to control all improvements made or to be made on said property, and to direct and manage the developement of the lands herein described and held by said parties hereto as tenants in common, and not as partners.

In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year first above written.

ROBERT OSBURN.
JOHN CARRIER.
A. F. BAUM.
N. CARRIER.
W. PHILLIPS.

Witness as to Robert Osburn, John Carrier, A. F. Baum, & Wm. Phillips—
JOSEPH S. MORRISON.

N. Carrier by—
S. SMITH.

The erasure on the 11th line of the preceding page, made before execution hereof, and the words "or to be made," inserted above last line of this page, before execution hereof, counting said lines from the bottom.

COMMONWEALTH OF PENNSYLVANIA, } ss:
City of Pittsburgh, }

Before me, the subscriber, a notary public for the city of Pittsburgh, Pennsylvania, personally came the above-named Robert Osburn, A. F. Baum, John Carrier, and Nathan Carrier, Jr., who, in due form of law, acknowledged the above and foregoing indenture and articles of agreement to be their act and deed, to the end that the same might be recorded as such.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, this twenty-fifth day of January, A. D. 1873.

[SEAL.] S. SMITH,
Notary Public.

36 COMMONWEALTH OF PENNSYLVANIA, } ss:
City of Pittsburgh, }

Before me, the subscriber, a notary public for the city of Pittsburgh, personally came the above-named William Phillips, who in due form of law acknowledged the above and foregoing indenture & article of agreement to be his act and deed, to the end that the same might be recorded as such.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal this 25th day of January, A. D. 1873.

[SEAL.] S. SMITH,
Notary Public.

CLEARFIELD COUNTY, *ss:*

Entered in the office for the recording of deeds, &c., April 18th, 1873, and recorded in miscellaneous book "C," page- 14, 15, 16, 17, & 18.

Witness my hand and official seal the day and year aforesaid.

[SEAL.] A. W. LEE, *Recorder.*
Per J. N. H.

37 THE COMMONWEALTH OF PENNSYLVANIA, } *ss:*
Jefferson County }

Recorded in the office for recording deeds, &c., in and for said county, in book No. 27, pages 412, 13, &c.

Given under my hand and seal of said office, this 30th day of July, A. D. 1873.

[SEAL.] J. B. HENDERSON, *Recorder.*

Indorsed: McClure *et al. vs.* R. P. Bohlen, Filed May 7, 1883. H. D. Gamble, *Cl'k.*

38 *Assignment.*

Know all men by these presents, that we, Robert B. Phillips and J. Patton Lyon, lawfully constituted administrators of the estate of William Phillips, deceased, late of the city of Pittsburgh, State of Pennsylvania, for and in consideration of the sum of five hundred dollars, have assigned, transferred, and set over unto Philip R. Bohlen, of the city of Memphis, State of Tennessee, and George I. Whitney, of the city of Pittsburgh, State of Pennsylvania, all the right, title, and interest of the said William Phillips, deceased, under certain articles of agreement made the 18th day of December, A. D. 1872, between Robert Osburn, A. F. Baum, John Carrier, and Nathan Carrier, Jr., parties of the first part, and said William Phillips, party of the second part, recorded in Clearfield county, State of Pennsylvania, in miscellaneous book C, pages 14, 15, 16, 17, & 18, and in Jefferson county, State of Pennsylvania, in book No. 27, pages 412, &c., in and to all the lands in said articles of agreement mentioned and described.

Witness our hands and seals this seventeenth day of June, A. D. 1874

R. B. PHILLIPS. [SEAL.]
I. PATTON LYON. [SEAL.]

Witness:
CHAS. L. PHILLIPS.

39 STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

On the seventeenth day of June, A. D. eighteen hundred and seventy-four, before me, a notary public in and for said county, came the above-named I. Patton Lyon and acknowledged the foregoing assignment to be his act and deed, and desired that the same might be recorded as such.

In witness whereof, I have hereunto set my hand and notarial seal, the day and year aforesaid.

[SEAL.] CHAS. L. PHILLIPS,
Notary Public.

STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

On the eighteenth day of June, A. D. eighteen hundred and seventy-four, before me, a notary public in and for said county, came the above-named Robert B. Phillips, and acknowledged the foregoing assignment to be his act and deed, and desired that the same might be recorded as such.

In witness whereof, I have hereunto set my hand and notarial seal, the day and year aforesaid.

[SEAL.] CHAS. L. PHILLIPS,
Notary Public.

40 STATE OF PENNSYLVANIA, } ss:
County of Clearfield, }

Recorded in the office for recording of deeds in said county, in deed book No. 5, page 306, &c.

Witness my hand and official seal, the 15th day of August, A. D. 1874.

[SEAL.] A. W. LEE,
Recorder, P. J.

STATE OF PENNSYLVANIA, } ss:
County of Jefferson, }

Recorded this 19th February, A. D. 1875, in the recorder's office of said county, in deed book No. 30, page 12.

Given under my hand and seal of said office, the date aforesaid.

[SEAL.] J. B. HENDERSON, *Recorder.*

Indorsed: Assignment. Administrators of William Phillips, deceased, to Phillip Bohlen and George I. Whitney. Ent. by Jake Hill, Aug. 15, 1874; fees, $2.25, paid. Filed by Jake Hill, Feb'y 18, 1875, and fees paid, $2.25. Filed May 7, 1883. H. D. Gamble, cl'k.

41 This indenture, made the twenty-third day of June, in the year of our Lord one thousand eight hundred and seventy-four, between Robert B. Phillips, Phœbe A. Phillips, his wife, and Eliza B. Phillips, heirs of William Phillips, deceased, late of the city of Pittsburgh, State of Pennsylvania, parties of the first part, and Phillip R. Bohlen, of the city of Memphis, State of Tennessee, and

George I. Whitney, of the said city of Pittsburgh, State of Pennsylvania, parties of the second part, witness, that the said parties of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, unto them in hand paid by the said parties of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released, and quit-claimed, and by these presents do remise, release, and quit-claim, unto the said parties of the second part, their heirs and assigns forever, all the undivided one-half of certain tracts or parcels of land, situate in the counties of Clearfield and Jefferson, State of Pennsylvania, being the same tracts or parcels of land which Robert Osburn, A. F. Baum, John Carrier, and Nathan Carrier covenanted to convey to William Phillips
42 aforesaid, by certain articles of agreement made the 18th day of December, A. D. 1872, recorded in Clearfield county, in the office for the recording of deeds, in miscellaneous book "C," pages 14, 15, 16, 17, & 18, and recorded in Jefferson county in the office for recording deeds, in book 27, pages 412, 413, &c., as by reference to said articles of agreement will more fully and at large appear; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversions, remainders, rents, issues, and profits thereof. And also all the estate, right, title, interest, property, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances; to have and to hold, all and singular, the above-mentioned and described premises, together with the appurtenances, unto the said parties of the second part, their heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ELIZA B. PHILLIPS. [SEAL.]
R. B. PHILLIPS. [SEAL.]
PHŒBE A. PHILLIPS. [SEAL.]

Sealed and delivered in the presence of Chas. L. Phillips.

43 Received the day of the date of the above indenture, of the above-named Philip R. Bohlen and George I. Whitney, the sum of one dollar, lawful money of the United States, being the consideration money above mentioned, in full.

ELIZA B. PHILLIPS.

Witness:
CHAS. L. PHILLIPS.

STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

On the 23rd day of June, anno Domini 1874, before me, notary public in and for said county, came the above-named Eliza B. Phillips, Robert B. Phillips, and Phœbe A. Phillips, his wife, and acknowledged the above deed to be their act and deed, and desired to

have it recorded. Said Phœbe A. Phillips, being of full age, and by me examined separate and apart from her said husband, and the contents of the said deed being first made known to her, declared that she signed, sealed, and delivered said deed of her own free will and accord, without coercion or compulsion of her husband.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL.] CHAS. L. PHILLIPS,
Notary Public.

STATE OF PENNSYLVANIA, } ss:
Clearfield County, }

44 Recorded this 15th day of August, A. D. 1874, in the recorder's office of said county, in deed book vol. 5, page- 307 & 308. Given under my hand and seal of the said office the date above written.

[SEAL.] A. W. LEE, *Recorder.*
J.

JEFFERSON COUNTY, } ss:
Pennsylvania, }

Recorded this 19th day of February, 1875, in the recorder's office of said county, in deed book No. 30, page 11.

Given under my hand and seal the day and year aforesaid.

[SEAL.] J. B. HENDERSON, *Recorder.*

Endorsed: Quit-claim deed to Phillip R. Bohlen and George I. Whitney, from the heirs of William Phillips. Ent. by Jake Hill Aug. 18, 1874. Fees, $2.50; paid. Filed 19th Feb'y, 1875. Fees paid, $2.50. Filed May 7, 1883. H. D. Gamble, cl'k.

45 THE UNITED STATES OF AMERICA, } ss:
Western District of Pennsylvania. }

I, H. D. Gamble, clerk of the circuit court of the United States in and for the western district of Pennsylvania, do hereby certify that the foregoing pages contain a full, complete, and exact copy of the article of agreement between Robert Osborne, A. F. Baum, John Carrier, and Nathan Carrier, of the one part, and Wm. Phillips of the other part, dated the 18th day of December, A. D. 1872, and recorded in the county of Clearfield, in miscellaneous book "C," pp. 14, 15, &c., and in the county of Jefferson on the 30th day of June, 1873, in book No. 27, pp. 412, &c.

Also of the deed of assignment made by R. B. Phillips and J. Patton Lyon, administrators of the estate of Wm. Phillips, to P. R. Bohlen (plaintiff) and George I. Whitney, dated June 7, 1874, and recorded in said county of Clearfield August 15, 1872, in deed book No. 5, page 306, and in said county of Jefferson on Feb'y 19, 1875, in deed book No. 30, page 125; also deed from R. B. Phillips and Phœbe A. Phillips, heirs-at-law of William Phillips, to Phillip R. Bohlen and George I. Whitney, dated June 23rd, 1874, and recorded in said county of Clearfield August 15, 1874, and in said
46 county of Jefferson, February 17th, 1875, so full and entire as the same remains of record and on file in said clerk's office.

In testimony whereof I have hereunto signed my name and affixed the seal of said court, at Pittsburgh, this 4th day of June, A. D. 1883.

[SEAL.] H. D. GAMBLE,
Clerk U. S. Circuit Court W. D. Pa.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Marcus W. Acheson, judge of the United States district court, presiding in the circuit court of the United States for said district, do hereby certify that H. D. Gamble, above named, was at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

MARCUS W. ACHESON,
Presiding in U. S. Cir. Court.

Endorsed: Supreme court U. S. 1883, October term. No. 667. P. R. Bohlen, plaintiff in error, *vs.* Richard Arthurs, assignee, &c. *Certiorari* & return. Filed 6th June, 1883.

Endorsed on cover: W. Pennsylvania C. C. U. S. No. 325. P. R. Bohlen, plaintiff in error, *vs.* Richard Arthurs, assignee of A. F. Baum and John Carrier, bankrupts, A. M. McClure, James Carthers, & Charles Wilson. Filed 7th October, 1882.

115-482

RECEIVED
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CLERK.

BRIEF

AND

ARGUMENT FOR PLAINTIFF IN ERROR.

P. R. BOHLEN, Plaintiff in Error,

vs.

RICHARD ARTHURS, A. M. McCLURE, JAMES CATHERS and CHAS. WILSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, WESTERN DISTRICT OF PENNSYLVANIA.

GEO. SHIRAS, JR.
Attorney for Plaintiff.

IN THE

Supreme Court of the United States,

No. 325, October Term, 1884.

P. R. BOHLEN, Plaintiff in Error,

vs.

RICHARD ARTHURS *et al.* Defendants in Error.

I.

This is an action of replevin to recover the value of ninety-three thousand cubic feet of square timber, of the value of fourteen thousand eight hundred and eighty dollars. The defendants having given bond and retained the timber.

Upon the trial, there was in evidence the contract between Robt. Osborne, A. R. Baum and John Carrier of the one part, and William Phillips of the other part, in which the said parties of the first part did bargain and sell to said party of the second part, the one-half of certain lands.

There was also in evidence, regular conveyances of all the interest of William Phillips to P. R. Bohlen, the plaintiff, and Geo. I. Whitney. It was further in evidence that P. R. Bohlen and Geo. I. Whitney, under the terms of said agreement, went into possession of one of the pieces of land mentioned and embraced in said contract, and through one Joseph McCracken, their employee and agent, remained in actual possession for a period of about six months, and while so in possession, cut, hewed and rafted and partly run the timber in dispute—when the defendants took possession of the same, and this action was brought, Geo. I. Whitney having first assigned to P. R. Bohlen all his interest in the same, subject to all the terms and conditions of the agreement of William Phillips.

Upon hearing the plaintiff's testimony at the trial, the Court instructed the jury "to find a verdict for the defendants, the plaintiff having failed to show sufficient property in the timber to sustain replevin."

II. Assignment of Error.

The Court erred in directing the jury "to find a verdict for the defendants, the plaintiff having failed to show sufficient property in the timber to sustain replevin."

We submit, the plaintiff did not fail to show sufficient title or property in the timber to sustain replevin, and this question should have been submitted to the jury. It was admitted on the trial, that all the conveyances and the contract offered and admitted in evidence, embraced the land from which the timber was taken (see Record, p. 7), and it was in evidence that the plaintiff and Geo. I.

Whitney, through said conveyances, claimed an interest as tenants in common in said land (see Record, p. 16), and through Jos. McCracken, their employee, went into the possession of the land, under contract Sept. 13, 1876, and remained so in possession till the following Spring, when the timber, in the meantime cut, was rafted and started to the point of delivery. It was admitted that on Dec. 18, 1872, the title to the land was good in A. R. Baum, John Carrier and Robt. Osborne, when, as parties of the first part, they signed, sealed and delivered the agreement with William Phillips (see Record, p. 11). In this contract, the said Baum, Carrier and Osborne, for the consideration therein expressed, did agree to bargain and sell to William Phillips, and jointly and severally for themselves, their heirs, executors and administrators, did covenant, promise, grant and agree to and with said William Phillips, party of the second part, that upon payment of the consideration, &c. therein specified and mentioned, they would by good and lawful deed or deeds, with covenant of general warranty, well and sufficiently grant, convey and assure with the said William Phillips, his heirs and assigns, in fee simple, clear of all incumbrances, the undivided one-half of all the lands described therein; and in consideration whereof, the said William Phillips, for himself, his heirs, executors, administrators and assigns, did therein covenant, promise and agree to and with the said Baum, Carrier and Osborne, their heirs and assigns, to pay or cause to be paid unto said A. R. Baum, John Carrier and Robert Osborne, their executors, administrators and assigns, the sum of one hundred and twenty-five dollars per acre, for each and every acre contained in the undivided one-half part of all of said

lands, amounting in the aggregate to $206,000, payment thereof to be made out of the proceeds of said lands, when and as soon as moneys shall be realized from the sale of any part of said lands, *from the sale of timber thereon*, or coal, or other minerals therein contained, or lumber manufactured upon said premises, in mills thereon to be erected, as therein mentioned and provided for; and further, it was expressly covenanted and agreed, that the said William Phillips should have the right to control all improvements, and to direct and manage the development of the lands *to be held by said parties thereto as tenants in common*, and not as partners (see page 16 of Record).

Soon after the execution, delivery and recording of this agreement, William Phillips died, and his representatives by deed (see Record, p. 17), and the heirs of said William Phillips, by deed (see p. 18), conveyed to P. R. Bohlen, the plaintiff, and Geo. I. Whitney, all of the decedent's title to and interest in said lands, and under said agreement.

P. R. Bohlen and Geo. I. Whitney at once proceeded to comply with and carry out the terms of said sale to William Phillips, and to that end, on September 13, 1876, made a contract with Joseph McCracken, to cut from said lands, about one hundred thousand cubic feet of square timber, for a price stipulated, and to deliver the same to them at Pittsburgh, Pa. McCracken immediately went with his workmen upon the land, built shanties, and remained there until the Spring of 1877. About April 12, 1877, he had rafted on the land, ninety-three thousand cubic feet of square timber, under his contract, and which, on the way to the point of delivery, was seized by the defendants, who

resided in the neighborhood of the land, and who claimed to have some title or interest in the same. One of the defendants, Richard Arthurs, apparently representing Carrier and Baum, parties of the first part in said agreement. The timber was found by Bohlen and Whitney in the possession of defendants, who refused to surrender the same, and this action was brought. Geo. I. Whitney having first transferred all his interest in the timber to the plaintiff, with the express stipulation, that the net proceeds should be appropriated to the payment of the purchase money as provided in said agreement.

The defendants furnished the United States Marshal what he considered a sufficient bond, and retained the timber; and thus converting this action of replevin to a personal action for its value only.

Joseph McCracken, a witness, identified the timber as the same cut by him from the land described under his contract with Bohlen and Whitney, and testified that it was worth sixteen cents per cubic foot delivered at Pittsburgh, in the aggregate, $14,880.00, (see p. 8).

III.

We contend that the plaintiff, under the evidence, being in the possession of the land under a record title, from which the timber was cut and taken, was entitled to a verdict for the value of the same.

By an Act of the General Assembly of the State of Pennsylvania, entitled "An Act relative to actions of replevin," approved May 15, 1871, pamphlet laws, page 268, it is provided :

"SEC. 1. That in all actions of replevin now pending or hereafter brought to recover timber, lumber, coal, or other property severed from realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed, may be in dispute: provided, said plaintiff shows title in himself at the time of severance."

It was admitted (see p. 7 of Record) "that both plaintiff and defendants claimed under A. R. Baum, John Carrier and Robt. Osborne, whose title to the said land from which said timber was taken was admitted to be good and sufficient previous to the 18th day of December, A. D. 1872.

A. R. Baum, John Carrier and Robt. Osborne, by agreement (see pp. 11, 12, etc. of Record), sold the one undivided half part of said land to William Phillips. Wm. Phillips died intestate (see p. 7); his administrators, by deed (see p. 17) of assignment, conveyed all of decedent's right in the land, and made the contract to plaintiff and Geo. I. Whitney. The heirs of William Phillips, by deed of quit claim (see page 18 of Record), confirmed said sale. All showing title in the premises to be in the plaintiff and Geo. I. Whitney, who contracted with McCracken, to cut and deliver the timber in dispute.

In *Harlan vs. Harlan*, 3 Harris, Pa. Rep. p. 513, it is decided that "either a special or general property in the plaintiff is sufficient to sustain replevin." The same is affirmed in *Lester vs. McDowell*, 18 Pa. Rep. p. 91, and in *Meed vs. Kilday*, 2 Watts, p. 110.

GEO. SHIRAS, JR.
Attorney for Plaintiff.

115-482

SUPREME COURT U. S.
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1884,

No. 325.

P. R. BOHLEN, Plaintiff in Error,

versus

RICHARD ARTHURS, and others.

In Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

ROBERT ARTHURS,
GEORGE SHIRAS, Jr.,
Counsel for Plaintiff in Error.

W. V. DENNITT & CO. PRINT.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1884.

No. 325.

P. R. BOHLEN, Plaintiff below and Plaintiff in Error,

versus

RICHARD ARTHURS, Assignee of A. F. BAUM and JOHN CARRIER, Bankrupts; A. M. McCLURE and others.

STATEMENT OF THE CASE.

This was an action of replevin, in which P. R. Bohlen, a citizen of Tennessee, was the plaintiff, and Richard Arthurs, assignee of Baum & Carrier, and A. M. McClure, citizens of Pennsylvania, were defendants.

The subject of the action was twenty-seven rafts of square white pine timber, containing about ninty-four thousand cubic feet, and of the value of sixteen thousand dollars. At the time when the plaintiff sued out his writ of replevin, on April 24, 1877, the rafts in question were lying part in the Allegheny river and part in Red Bank and Sandy Lick Creeks. The Marshal returned on the writ that he had

replevied the timber—that the defendants had given a bond for the release of the property, and that the same was released.

The plaintiff's declaration averred property in the plaintiff, and that defendants took and unjustly retained said timber. The defendants' plea was in terms, as follows:

"Richard Arthurs, assignee in bankruptcy of the firm of Carrier & Baum, by H. C. Campbell, his attorney; A. M. McClure, by Miller & McBride, his attorneys, the defendants in the above entitled suit, say that, as they are informed, all the parties alleged to have an interest in the property claimed in this suit are not joined, and that the Court does not have jurisdiction of the subject matter in controversy. That if the said Court has jurisdiction of the subject matter, and parties, then defendants say that the goods and chattels mentioned and specified in plaintiff's declaration, viz.: twenty-seven rafts of white pine square timber, are not the goods and chattels of said plaintiff; that the plaintiff does not have any title to a property in the said twenty-seven rafts of timber, as alleged in his declaration, but that the title to said property in said twenty-seven rafts of timber, the goods and chattels specified, belongs to Richard Arthurs, assignee in bankruptcy of Carrier & Baum, and A. M. McClure, the defendants."

The plaintiff's replication was as follows:

"The plaintiff, in reply to the plea of defendants, says, that the matters therein set forth are not true, and of this he puts himself upon the country."

The case being thus at issue, a jury was sworn and the record discloses the following:

"May 13th, 1878.

The above case being at issue, a jury was called, who came, viz.: (here follows names of jury,) twelve, good and lawful men, who having been duly summoned, returned, ballotted for, and empaneled, were sworn to well and truly

try and a true verdict render according to the evidence; and the evidence and argument of counsel for the respective parties being closed, by direction of the Court, the jury returns a verdict in favor of defendant and against the plaintiff on May 14, 1878." A motion for a new trial and argument thereof intervened, and judgment was not entered till April 28, 1881.

At the trial it having been admitted by the counsel of the respective parties that both plaintiff and defendants claimed under A. F. Baum and John Carrier and Robert Osborne, and that the title of said Baum, Carrier and Osborne to the land, from which said timber was taken, was good and sufficient previous to the 18th day of December, 1872, the plaintiff, to maintain his side of the issue, put in evidence certain articles of agreement between Robert Osborne, A. F. Baum, John Carrier, and Nathan Carrier, of the one part, and one William Phillips, of the other part, dated December 18, 1872, and recorded in the Recorders' offices of Clearfield and Jefferson counties, Pa. This he followed with proof of the death of William Phillips, in April, 1874, and of the due appointment of administrators, and that R. B. Phillips and Eliza B. Phillips were his only heirs at law. Then followed in evidence a deed of assignment or transfer made by R. B. Phillips and J. P. Lyon, administrators of William Phillips, deceased, of all the right, title, and interest of William Phillips, deceased, in and to the land in Jefferson and Clearfield counties, under articles of agreement dated December 18, 1872, unto Philip R. Bohlen, of the city of Memphis, Tennessee, and George I. Whitney, of the city of Pittsburgh, Pa. Plaintiff likewise put in evidence a deed of conveyance by R. B. Phillips and Eliza Phillips, only heirs of said William Phillips, of all their right, title, and interest, as said heirs, in and to the lands described in said articles of agree-

ment of December 18, 1872. These deeds were shown to have been duly recorded in Jefferson and Clarion counties; and it was admitted that said conveyances and contract embrace the land from which the timber in question was cut.

The plaintiff also offered in evidence a written contract between P. R. Bohlen and George I. Whitney, of the one part, and one Joseph McCracken, dated September 13, 1876, in and by which said McCracken agreed, for a stipulated price, to cut from said land about one hundred thousand cubic feet of square white pine timber, and to deliver the same to said Bohlen and Whitney at Pittsburgh, Pa. Also an assignment, dated April 23, 1877, of all the title and interest of said George I. Whitney in said timber to said P. R. Bohlen.

The plaintiff then called said Joseph McCracken, who testified that the twenty-seven rafts, the subject of this action, were composed of timber cut by him, in pursuance of his said contract with Bohlen and Whitney, from said land; that they contained ninety-three thousand cubic feet, and were worth at Pittsburgh sixteen cents, and at the place from which they were taken about eleven to twelve cents per cubic foot. Plaintiff then put in evidence the writ and the Marshall's return, both dated April 24, 1877, and rested.

The defendants offered no evidence, and the Court thereupon instructed the jury that the plaintiff had failed to show sufficient property in the timber to sustain replevin, and directed a verdict to be entered in favor of the defendants.

This action of the Court, in directing a verdict in favor of the defendants, upon the pleadings and evidence, forms the subject of the single bill of exceptions in the case.

ASSIGNMENTS OF ERROR.

1st. The learned judge erred in directing the jury to find a verdict for the defendants—as shown by the following bill of exceptions:

"Be it remembered that on the 24th day of April, A. D. 1877, an action of replevin was brought in the Circuit Court of the United States, for the Western District of Pennsylvania, by Mr. P. R. Bohlen, a citizen of the state of Tennessee, against A. M. McClure, Richard Arthurs, John Cathers, and Charles Wilson, to recover the possession of twenty-seven rafts of white pine timber, containing about ninety-six thousand cubic feet, and of the value (of) about sixteen thousand dollars; that upon the service of the writ of replevin the defendant appeared to said action and did, on the 25th day of April, A. D. 1877, furnish to John Hall, Esq., the United States Marshal for said district, a bond, satisfactory and sufficient to him, and thereupon he delivered to the defendant and allowed them to retain the said twenty-seven rafts of white pine timber of the dimension and value aforesaid; and the plaintiff having filed a declaration in due form the said defendant did, on the day of , A. D. 1877, by their counsel, file their plea that the right of property in said twenty-seven rafts of timber was in them, the said defendants, and not in the said plaintiff, as alleged in his said declaration; on the 14th day of May, A. D. 1878, the parties to said cause being at issue a jury was called, empanelled and sworn, whereupon the party plaintiff proceeded to offer his evidence, to maintain the issue on his part, it having been agreed in open Court, by the counsel of the respective parties, that both plaintiff and defendant claimed under A. F. Baum, John Carrier, and Robert Osborne, whose title to

the said land from which said timber was taken, was admitted to be good and sufficient previous to the 18th day of December, A. D. 1872; and said plaintiff offered in evidence article of agreement between Robert Osborne, A. F. Baum, John Carrier and Nathan Carrier, of the one part, and William Phillips, of the other part, dated the 15th day of December, A. D. 1872, and recorded in the county of Clearfield, in miscellaneous book C, pp. 14, 15, etc., and in the county of Jefferson on the 30th day of June, 1873, in book No. 27, pp. 412, etc.

In the following words, namely: Whereas Robert Osborne, of Brookville, in the county of Jefferson, of Commonwealth of Pennsylvania, A. F. Baum, of Pittsburgh, in the Commonwealth of Pennsylvania, and John Carrier, of Cincinnati, in the state of Ohio, are joint owners of certain tracts of land hereinafter described, situate partly in the county of Jefferson and partly in the county of Clearfield, in the Commonwealth of Pennsylvania aforesaid, containing in the aggregate 3,300 acres; and whereas, Nathan Carrier, Jr., of Brookville, in the Commonwealth of Pennsylvania aforesaid, is sole owner of certain lands situate in counties and Commonwealth aforesaid, adjacent of the said lands belonging to said Osborne, Baum and John Carrier; and whereas, the said parties have mutually agreed to sell and convey the undivided one-half of all the aforesaid land to them, respectively belonging and hereinafter described to William Phillips, of Pittsburgh, for himself and his associates, for the consideration and upon the terms hereinafter mentioned and specified; now therefore, this agreement made and entered into this 18th day of December, 1872, by and between the said Robert Osborne, A. F. Baum and John Carrier, and Nathan Carrier, Jr., parties of the first part, and the said William Phillips, party of the second part, witnesseth that Robert Osborne, A. F. Baum

and John Carrier, three of the above named parties of the first part, for the consideration and covenants hereinafter mentioned and expressed, have granted and sold unto the party of the second part, and by these presents do jointly and severally for themselves, their heirs, executors and administrators, covenant, promise, grant and agree to and with William Phillips, the said party of the second part, that upon payment of the consideration and performance of the covenants hereinafter specified and mentioned by the said party of the second part, they the said Robert Orborne, A. F. Baum and John Carrier shall and will by good and lawful deed or deeds, with covenants of general warranty, well and sufficiently grant, convey and assure, unto the said party of the second part, his heirs and assigns, in fee simple, clear of all encumbrances an undivided one-half of all the following described real estate, viz.: the undivided one-half of all those three certain tracts or pieces of land situate in the townships of Huston and Brady, in the county of Clearfield and Commonwealth aforesaid, bounded and described as follows: The first thereof beginning at an old hemlock corner, on line of warrant, 4398; thence along tract line south 89°, east 425 perches to a maple; thence along tract of warrant 3593, south ½°, west 420 perches to post; thence along line of warrant 1988, north 89¼°, west 432.3 perches to a beech on line of warrant 4399; thence along said warrant north ¾°, east 314 perches to a blocked hemlock; thence north 3° 25′, east 108 perches to hemlock, the place of beginning, containing 1,132 acres, and known as warrant 3592.

The second thereof beginning at a beech, corner of tract 3592 above described; thence south 89¼°, east 432.3 perches to a post, corner of tracts 3592, 3593 and 1988; thence along line of tract 3584, south ¾°, west 172 perches to a post corner; thence along line of tract 2009, north 434.5 perches to a post;

thence north 14°, east 171.1 perches to beech, the place of beginning, containing 464.68 acres, and known as warrant 1988.

The third thereof beginning at a post, corner of tract 1988 above described; thence along the same south 89°, east 434.5 perches to a post on line of tract 3584; thence along tract 3484 and balance of tract 2009, south ¾°, west 398 perches to a post on line of tract 27; thence north 41° 55′, west 42 perches to a hemlock; thence north 88°, west 205 perches to an elm; thence north 32°, west 57 perches to pine, corner of tract 13; thence along same north 38° 50′, west 227 perches to a hickory; thence north 1° 5′, west 87 perches to a maple; thence north 45.30, west 31.6 perches to post, the place of beginning, containing 816.56 acres, and being a part of warrant 2009, and being the same tracts or pieces of land granted and conveyed to Robert Osborne, A. F. Baum and John Carrier by John Dubois, by deed dated March 30, 1868, and recorded in the county of Clearfield, in Deed Book, vol. F. F., pages 60, 61, etc.

Also the undivided one-half of all that certain tract or piece of land adjacent to the tracts last above described, situate in Brady township, in the county aforesaid, bounded on the east by tract No. 13, warranted in the name of Christian Lowers, on the south by other lands of said Osborne, Baum and Carrier, on the west by the Clearfield and Jefferson county line, and on the north by lands of Bell, containing 200 acres, more or less, being the same land warranted in the name of George Mason, and by him granted and conveyed to Robert Osborne, one of the within grantors, by deed dated November 10, 1870, and recorded in the county aforesaid, in Deed Book, vol. G. G., page 260.

Also the undivided one-half of all that certain tract or piece of land adjacent to lands above described, and bounded as

follows, viz.: Beginning at maple (O. C.) on line of tract 2009 hereinafter described; thence by same south 85 perches to hickory (O. C.); thence by same south 40°, east 216 perches to pine (O. C.); thence by land of Bell, north 45°, west 320 perches to birch; thence south 65°, west 32 perches to pine (O. C.); thence by land of Bell, south 40°, west 140 perches to pine (O. C.); thence by same south 72 perches to hemlock (O. C.); thence south 85°, west 103 perches to ash; thence north by lands of Fye, widow, Osborne, and other land of Osborne, Baum and Carrier, hereinafter next described 266 perches to pine (O. C.); thence by land of Garrison, east 32 perches to maple (O. C.); thence north 65° 15′, east 282 perches to sugar (O. C.); thence south 45½°, east 93.6 perches to maple, the place of beginning, containing 521 acres and allowances being the same tract granted and conveyed to A. F. Baum and John Carrier within named, by heirs of Bartroff by deed dated and recorded in Clearfield county, in Deed Book, vol. 1, page .

Also the undivided one-half of all that other certain tract or piece of land situate in the township of Washington, in the county of Jefferson, bounded as follows: Beginning at a sugar, the 28th mile tree; thence south 2°, west 162.4 perches to a post; thence north 88°, west 163 perches to a post; thence north 2°, east 162.4 perches to a beech; thence south 88°, east 163 perches to the place of beginning, containing 165½ acres, being the same piece of land conveyed to Robert Osborne within named, by Andrew Smith, executor of John Osborne, deceased, by deed dated June 22, 1867, and recorded in the county of Jefferson, in Deed Book, vol. 24, pages 40 and 41, reserving and excepting four acres heretofore granted to the Allegheny Valley Railroad Co., by the within named Osborne, Baum and Carrier, to be located on line of said railroad known as Bennett's Branch, at such point as may be

selected by said company. In consideration whereof the said party of the second part, for himself, his heirs, executors, administrators and assigns, doth by these presents, covenant, promise, and agree to and with the above named Robert Osborne, A. F. Baum and John Carrier, three of the said parties of the first part, their heirs and assigns, that he, the said party of the second part, shall and will truly pay or cause to be paid unto the said Robert Osborne, A. F. Baum and John Carrier, their executors, administrators or assigns, the sum of one hundred and twenty-five dollars per acre, for each and every acre contained in the undivided one-half part of each of the said several tracts or pieces of land hereinbefore described, amounting in the aggregate to the sum of 206,-000.00 payment thereof to be made out of the proceeds of said land, when and as soon as money shall be realized from the sale of any part of said lands, or from the sale of timber thereon, or coal or other minerals therein contained, or lumber manufactured upon said premises in mills thereon to be erected as hereinafter mentioned and provided for; provided, however, and it is hereby distinctly stipulated, covenanted and agreed, that interest shall not be paid by the party of the second part on the deferred consideration money hereinbefore mentioned, or any part thereof; and it is also stipulated and agreed that the said party of the second part shall have the right at any time, at his option and election, to pay to the parties of the first part, or their legal representatives, the consideration money above mentioned for the whole or any part of the land and premises hereby granted, and thereupon to demand and receive a deed or deeds for the same as hereinbefore provided for; and Nathan Carrier, Jr., above named, one of the said parties of the first part for the consideration and covenants hereinafter mentioned and and expressed, hath granted and sold unto the party of the second part and by

these presents, doth for himself, his heirs, executors and administrators, covenant, promise and agree with William Phillips, the said party of the second part, that upon payment of the consideration and performance of the covenants hereinafter mentioned and specified by the said party of the second part; he, the said Nathan Carrier, Jr., will by good and lawful deed or deeds with clause of general warranty, well and sufficiently grant, convey and assure unto the said party of the second part, his heirs and assigns in fee simple, clear of all encumbrances, the undivided one-half of all the following real estate, viz: The undivided one-half part of each of those three several tracts or pieces of land mentioned in the articles of agreement between Wm. N. Gordon and Wm. Smith, dated the 16th day of August, A. D. 1858, and therein described, situate in the township of Washington, in the county of Jefferson and in the township of Huston, in the county of Clearfield and Commonwealth aforesaid, adjacent to the lands hereinbefore described and granted to the said party of the second part, by Robert Osborne, A. F. Baum and John Carrier, one of the said tracts containing 1,383 acres, one containing 227 acres and one containing 75 acres, making in all 1,685 acres, more or less, excepting and reserving therefrom 25 acres out of the northwest corner of the tract for 227 acres belonging to Richard Armstrong; also reserving and excepting 61 acres heretofore sold to Grogan; also 50 or 60 acres sold to Nosker and 25 acres sold to R. Miller; it is hereby stipulated and agreed that the pine timber on said several reservations passing and belonging to the within and above named Nathan Carrier, shall be included in the grant hereby made by the said Nathan Carrier to the said party of the second part, that is that he, the said party of the second part, shall be entitled under this agreement to the one-half of all the pine timber passing and belonging to said

Nathan Carrier under the several reservations above mentioned; the said lands above mentioned being the same three tracts mentioned *inter alia*, and sold by Wm. M. S. Smith and A. W. Miner to Ira C. Fuller, the above named Nathan Carrier, by articles of agreement dated January 10, 1866, and recorded in the county of Clearfield, in miscellaneous book A, pages 269, etc., as reference thereunto being had will fully and at length appear in consideration whereof, the said party of the second part for himself, his executors, administrators and assigns, doth by these presents, covenant, promise and agree to and with the above named Nathan Carrier, one of the said parties of the first part, his heirs and assigns, that he, the said party of the second part, shall and will truly pay or cause to be paid unto the said Nathan Carrier, his heirs or assigns, the sum of $125 per acre for each and every acre contained in the undivided one-half part of each of the said several tracts or pieces of land hereinbefore mentioned and described, amounting in the aggregate to the sum of $94,-625.00 payment thereof to be made out of the proceeds of said lands, when and as soon as moneys shall be realized from the sale of any part of said lands, or from the sale of timber thereon, or coal or other minerals therein contained, or lumber manufactured upon said premises in mills thereon to be erected as hereinafter mentioned and provided for; and it is hereby distinctly stipulated, covenanted and agreed, that interest shall not be paid by the party of the second part on the deferred consideration money hereinbefore mentioned, or any part thereof; it is also stipulated and agreed that the said party of the second part, shall have the right at any time, at his option and election, to pay to the said Nathan Carrier or his legal representatives, the consideration money above mentioned for the whole or any part of the lands and premises hereby granted, and thereupon to demand and receive a deed or deeds for the same as hereinbefore mentioned and provided for.

And the said party of the second part hereby further covenants and agrees, to and with the said Robert Osborne, A. F. Baum, John Carrier and Nathan Carrier, Jr., to advance and pay the one-half of such amounts of money as may be necessary to construct and erect a first class saw mill or saw mills, and such fixtures and machinery appurtenant thereto, and such other and additional improvements as he, the said party of the second part, may from time to time consider and determine to be advantageous and necessary for the profitable and full development of the said real estate hereinbefore described, and the said saw mills, machinery and other improvements, shall be located on such parts of said land as may be mutually agreed upon by the said parties of the first and second part herein named, holding as tenants in common and not as partners; and it is hereby expressly covenanted and agreed, that the said William Phillips, party of the second part named in his agreement, shall have the right and power to control all improvements made or to be made on said property, and to direct and manage the development of the lands herein described and held by said parties hereto as tenants in common and not as partners.

In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year first above written.

ROBERT OSBORNE, [SEAL.]
JOHN CARRIER, [SEAL.]
A. F. BAUM, [SEAL.]
NATHAN CARRIER, [SEAL.]
WM. PHILLIPS, [SEAL.]

Then proved the death of William Phillips and appointment of administrators, and that R. B. Phillips and Phœbe O. Phillips were his only heirs at law, and plaintiff then offered in evidence a deed of assignment made by R. B. Phil-

lips and J. Patton Lyon, administrators of the estate of said William Phillips to P. R. Bohlen, plaintiff, and George I. Whitney, dated June 17, 1874, and recorded in said county of Clearfield, August 15, 1874, in Deed Book No. 5, p. 306, and in said county of Jefferson, on February 19, 1875, in Deed Book No. 30, p. 12; also deed from R. B. Phillips and Phœbe O. Phillips, heirs at law of William Phillips to Philip R. Bohlen and George I. Whitney, dated June 23, 1874, and recorded in said county of Clearfield, August 15, 1874, and in said county of Jefferson, February 17, 1875; and it was admitted that all said conveyance and contract embrace the land from which said timber was cut and taken; plaintiff also offered in evidence contract between said P. R. Bohlen and George I. Whitney of the one part and Joseph McCracken, dated September 13, 1876, in and by which the said McCracken did agree for a stipulated price, to cut from said lands above, one hundred thousand cubic feet of square pine timber and deliver the same to said P. R. Bohlen and George I. Whitney, at Pittsburgh, Pennsylvania; also an assignment dated April 23, 1877, and all the interest of George I. Whitney in said timber to P. R. Bohlen; and Joseph McCracken, being then sworn, testified that the twenty-seven rafts, the subject of this action, were cut by him in pursuance of the said contract from said lands, and contained ninety-three thousand cubic feet and worth at Pittsburgh sixteen cents per cubic foot, and at the place from which they were taken about eleven to twelve cents. George Wilson also testified that such sales of such timber were made in the spring of 1877, at fifteen and one-half cents per cubic foot, part of which was of the timber in dispute; plaintiff's counsel then offered the writ and Marshal's return, date of both April 24, 1877, and closed, defendants' attorney then moved the Court for a non-suit.

Whereupon the Court instructed the jury that the plaintiff had failed to show sufficient property in the timber to sustain replevin and directed a verdict to be entered in favor of the defendants, to which judgment of the Court the plaintiff did then and there except and request the Court to seal a bill of exceptions which is accordingly done.

W. McKENNAN,

Circuit Judge.

2nd. The learned judge erred in not submitting the case to the jury without peremptory instructions to find for the defendants.

3rd. The learned judge erred in that he did not instruct the jury, under the pleadings and evidence, to find a verdict for the plaintiff.

BRIEF OF ARGUMENT.

As has been shown in the history of the case, the defendants offered no evidence. The record discloses that the learned judge who tried the cause filed no opinion, either at the trial, or in disposing of the motion for a new trial.

The only reason suggested for the direction of the Court to the jury to find for the defendants is found in that direction, viz: That "the plaintiff had failed to show sufficient property in the timber to sustain replevin."

We are thus led to an examination of the plaintiff's evidence, in order to see wherein it failed to show such title or property in the timber as to sustain an action of replevin.

The first question that presents itself is, what was the nature of the title of William Phillips. Could he, if living, have maintained an action of replevin for timber cut by his order, and taken from the possession of his servants while on its way to the market?

An inspection of the articles of agreement which vested title in Phillips, and which will be found set forth at length in the assignment of error on pages , will show that Osborne, Carrier and Baum, thereby granted and sold unto William Phillips, and covenanted and agreed, upon his subsequent payment of consideration and performance of covenants, to grant, convey, and assure to said Phillips, his heirs and assigns, in fee simple the undivided one-half of certain large tracts of timber land, situate in Jefferson and Clarion counties, Pa. It further thereby appears that said Phillips agreed to advance and pay the one-half of such amount of

money as may be necessary to construct and erect a first class saw mill or saw mills, and such fixtures and machinery as Mr. Phillips may, from time to time, consider and determine to be advantageous and necessary for the profitable and full development of said real estate on which said mills and machinery shall be located, on such parts of said lands as may be mutually agreed upon by the said parties, holding as tenants in common and not as partners. It was further stipulated in the articles that said Phillips should have the right and power to control all improvements made or to be made on said property, and to direct and manage the development of the lands described and held by said parties as tenants in common, and not as partners. Payment of the consideration money, without interest, was to be made out of the proceeds of said lands when and as soon as moneys shall be realized from the sale of any part of said lands, or from the sale of timber thereon, or lumber manufactured upon said premises in mills thereon to be erected as mentioned and provided for in the agreement.

Surely under these provisions it was within the power of Phillips, and indeed his duty, to have contracted with third parties, like McCracken, to cut and market the timber on the premises. The possession by Phillips was that of a tenant in common, and his duty, under the contract, was to proceed to develop the resources of the property, and to provide for the payment of the consideration by causing timber to be cut and marketed.

As against third persons, it is clear that such possession gave Phillips a title to the lumber cut and on its course to the market, and that such a title would amply sustain an action of replevin or of trover. Upon showing such a title and right of possession as were conferred by the articles of Decem-

ber 18, 1872, surely as against every one else than the defendants in this case, the title of Phillips and his property in the lumber were sufficiently made out.

The Act of Assembly of May 15, 1871,—see *Purdon's Digest*, vol. 2, pages 12, 66—provides in terms that "in all actions of replevin now pending or hereafter bought to recover timber, lumber, coal, or other property severed from realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute; provided, said plaintiff shows title in himself at the time of severance."

Such legislation was deemed necessary because the Supreme Court of Pennsylvania, in several cases, had held that title to land could not be tried in and by transitory actions like replevin and trover.

Mather vs. Trinity Church, 3 Sev. & Rawl, 507.

Brown vs. Caldwell, 10 Idem, 114.

But, in the present case, the record and evidence disclose no dispute about or concerning the title under the contract. Phillips had a right of possession. His agreement was to cut and market the lumber.

The case of *Harlan vs. Harlan*, 15 Pa. State Reports, 507, is applicable. It was there held that replevin would lie by a party having a right of possession of real estate to recover possession of lumber cut thereupon.

No reason is seen why the title of Phillips to this lumber could be disturbed by the tenants in common, or any one claiming under them. It does not appear that the contract had been rescinded. The rights and estate of Phillips thereunder had, by his death, involved upon his personal representatives and heirs, and, by deed and assignments, had become vested in Bohlen, the plaintiff.

Phillips, or these claiming under him, had possession of the lands from which the timber in question was cut. They had, in pursuance of the duties devolved upon Phillips by the agreement, caused the timber to be cut, and the latter was, when seized by the defendant, on its way to market. No evidence was offered showing a rescission of the agreement or a right to rescind. No offer was made to pay the expenses of cutting and rafting the timber, or that the latter had not been cut and rafted with the knowledge of the other parties to the agreement.

In this state of facts, it is submitted that the learned judge should have instructed the jury to find for the plaintiff, or, at least, have left the case to the jury without binding instructions in favor of the defendants.

GEORGE SHIRAS, JR.,
of Counsel for Plaintiff in Error.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1884,

No. 325.

P. R. BOHLEN, Plaintiff below and Plaintiff in Error,

versus

RICHARD ARTHURS, Assignee of A. F BAUM and JOHN CARRIER, Bankrupts, A. M. McCLURE and others.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

MILLER & McBRIDE,
JOHN DALZELL,
Counsel for Defendants in Error.

IN THE

Supreme Court of the United States,

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RICHARD ARTHURS, Assignee of A. F. BAUM and JOHN CARRIER, Bankrupts, A. M. McCLURE and others.

BRIEF OF ARGUMENT.

The plaintiff's evidence, at most, proved that the plaintiff, was a tenant in common with the defendants of the lands from which the timber was cut by him, and that at the time when the writ of replevin was issued the timber was in the possession of his co-tenants, the defendants.

It is shown by the Record, page 7, that "it was agreed in "open Court by the counsel for the respective parties that "both plaintiff's and defendants' claim under A. F. Baum, "John Carrier and Rob't Osborne, whose title to the land "from which said timber was taken was admitted to be good "and sufficient, previous to the 18th day of December, A. D. "1872."

The plaintiff then offered in evidence the article of agreement between Robert Osborne, A. F. Baum, John Carrier and Nathan Carrier of the one part and Wm. Phillips of the

other part, dated the 18th day of December, A. D. 1872, which is printed in the Record at page 11, *et seq.*

This agreement in terms made Wm. Phillips a tenant in common of these lands with A. F. Baum, John Carrier and Robert Osborne. Nathan Carrier had no interest in the particular lands from which the timber was taken as is shown by the agreement. The plaintiff claimed under Phillips but failed to show any compliance with the terms of his contract, by Phillips or himself, except the attempt to take and carry away the timber in controversy, some four years after the date of the contract.

Wm. Phillips died on April 10, 1874, and A. F. Baum and John Carrier were on June 22, 1874, adjudicated bankrupts, and at the date of the issuing of the writ of replevin Richard Arthurs was their assignee. The interest of Robert Osborne had, in 1875, been acquired by A. M. McClure at Marshal's sale. The other defendants were the employees of Richard Arthurs, assignee, and A. M. McClure, who were in full possession of the timber and claimed the rightful ownership thereof.

This being the state of the proofs when the plaintiff closed his case the learned Judge of the Circuit Court was clearly right in directing the jury "to find a verdict for the defendants, the plaintiff having failed to show sufficient property in the timber to sustain replevin."

A tenant in common, or joint tenant, or partner cannot maintain replevin against his co-tenant or co-partner for taking the common property.

Morris on Replevin, p. 125.
Wilson vs. Gray. 8, Watts, 25.
Kindy vs. Green. 32, Mich., 310.
Wright vs. Bennett. 3, Barbour, 455.
Reimheimer vs. Hemingray. 8, Casey, 432.

One joint tenant cannot sustain replevin against his co-tenant for the possession of the chattels owned by them in common, for the reason that unless there be some agreement to the contrary, one has as much right to the possession of the joint property as the other.

Wells on Replevin, Sect. 152.

The case of Wilson vs. Gray, 8, Watts, p. 25, is applicable.

On page 35 the Court says: "The defendant may plead property in the defendant and himself, and if true, must not only defeat the plaintiff in his writ, but entitle the defendant to a return of the property; because the latter, having had the possession of it, coupled with an interest, which makes his case the stronger, until improperly deprived thereof by the Sheriff under the plaintiff's writ, which he has no right to use for such purpose, has a right to be placed in *statu quo.* that is, restored to the possession of the property, as the joint owner thereof."

The Act of Assembly of May 15, 1871, see Purdon's Digest, Vol. 2, pages 1266, has no reference to a contest between tenants in common or co-partners for the possession of the common property, but provides that in replevin the plaintiff "shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute: provided said plaintiff shows title in himself at the time of the severance."

The Act of Assembly of May 4, 1869, see Purden's Digest, Vol. 2, page 1703, Sec. 1, provides:

"It shall be unlawful for any owner or owners of any undivided interest in timber land within the Commonwealth to cut or remove, or to cause to be cut or removed from the said land any timber trees without first obtaining the written consent of all co-tenants in said premises."

Section 2d, of said act, provides that the parties injured shall have every remedy in such case, as they now have against an entire stranger to the title.

There was no evidence in the case that the defendants ever assented to, or had any knowledge of the operations of P. H. Bohlen in attempting to carry away square timber from the land in question. On the contrary, the defendants took active measures to maintain their rights against what they deemed a most unwarranted trespass, by suing out a writ of replevin in Jefferson County, Pa., by virtue of which they were placed in possession of said rafts of square timber by the Sheriff of said County. In disregard of that proceeding and

subsequent thereto, the plaintiff below claiming to be a citizen of Tennessee, sued out the writ of replevin in the case in hand.

The assertion that the plaintiff was engaged in carrying out the Phillips agreement by cutting and rafting square timber from the lands therein described, will not bear examination in the light of the terms of the agreement. It contemplated the advancement by Phillips of money for the erection of a first-class saw mill or mills, and for such additional improvements as Phillips might from time to time consider and determine to be advantageous for the profitable and full development of said real estate. The site or sites of the mills are to be mutually agreed upon by the parties, and Phillips is to exercise a personal control over the improvements and over the development of the lands.

There is no evidence that the plaintiff in error offered to advance any money for the building of mills, or for the development of the land, or that he was in the least qualified to take the place of Phillips.

Moreover, it is clear that the agreement of 18th December, 1872, did not empower Phillips to cut and carry away square timber from the lands held in common. The agreement provides, (see page 14 of the Record,) in reference to the purchase money that "payment thereof is to be made out of the proceeds of said land when and as soon as money shall be realized from the sale of any part of said lands, or from the sale of timber thereon, or coal or other minerals therein contained, or lumber manufactured upon said premises in mills thereon to be erected, as hereinafter mentioned and provided for"

The words "or from the sale of timber thereon," evidently means a sale of standing timber, and the lumber is to be manufactured on the premises in the mills whose erection is provided for. It is a common and well recognized mode of passing title to standing timber in Pennsylvania, to sell it on the ground with the right to enter, cut and remove it.

The defendants in error also contend that the contract of December 18, 1872, is executory, and that, in the absence of any proof of performance upon the part of Phillips or those

claiming under him, no title to any part of the lands described in said agreement vested in him or them.

The agreement provides that Phillips shall pay Osborne, Baum and Carrier "one hundred and twenty-five dollars per acre for each and every acre contained in the undivided one-half of each of the several tracts of land described in said agreement, amounting in the aggregate to the sum of $206,-000, payment to be made out of the proceeds of said lands when and as soon as moneys shall be realized out of the sale of any of said lands, or from the sale of timber thereon or coal or minerals therein contained, or lumber manufactured upon said premises in mills thereon, to be erected as hereinafter mentioned and provided for." (Page 14 of Record.) No interest was to be paid on the consideration money, and (page 15 of Record) Phillips agreed "to advance and pay one-half of such amounts of money as may be necessary to construct and erect a first class saw mill, or saw mills, and such fixtures and machinery appurtenant thereto, and such other aud additional improvements as he, the said Phillips, may, from time to time, consider and determine to be advantageous and necessary for the profitable and full development of said real estate hereinbefore described, and the said saw mills, machinery and other improvements shall be located on such part of said lands as may be mutually agreed on by the said parties of the first or second part herein named holding as tenants in common and not partners; and it is hereby expressly covenanted and agreed that the said William Phillips shall have the right and power to control all improvements made or to be made on said property, and to direct and manage the development of the lands herein described and held by said parties hereto as tenants in common and not as partners."

The furnishing of this money by Phillips, his personal supervision of the projected mills and improvements, and the development of these lands, are, we submit, conditions precedent to the vesting of any title whatever to these lands in Phillips, and there is no evidence that either he or those claiming under him ever advanced one dollar or took a single step toward the performance of the agreement.

We submit that without performance, or at least a tender thereof, a Court of Equity would not have decreed specific performance of this contract in favor of William Phillips had he been living in 1876, the date at which the timber was taken by plaintiff; and the contract so much involves the personal services, supervision, skill and judgment of Mr. Phillips that after his death, without any performance whatever, a Court of Equity would not have decreed specific performance in favor of the plaintiff.

Marble Company vs. Ripley. 10, Wallace, 339.

The Port Clinton R. R. Co. vs. the Cleveland and Toledo R. R. Co. 13, Ohio, 544.

Waterman on specific performance, Sect. 475.

We submit therefore:

1. That the plaintiff cannot maintain replevin against his co-tenants in possession.

2. That the contract of the 18th of December, 1872, does not authorize the cutting and carrying away of square timber, but provides only for the sale of standing timber, or its manufacture on the premises.

3. That without proof of the written consent of all his co-tenants to cut and remove the standing timber, the plaintiff took no title to the timber in question. (Purdon's Digest, Vol. 2, p. 1703. Printed above.)

4. That Phillips having died in 1874, and there being no proof of performance on his part, or that of those claiming under him, and no explanation of said *laches*, the contract of the 18th of December, 1872, was at the time of the taking of the timber, invalid and incapable of enforcement in Equity.

MILLER & MCBRIDE,
JOHN DALZELL,
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